United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

B

74-2066

In The

United States Court of Appeals

For The Second Circuit

*

Docket No. 74-2066

UNITED STATES OF AMERICA,

Appellee,

- against -

CHARLES MESSINA,

Appellant.

On appeal from the United States District Court
for the Eastern District of New York

BRIEF OF APPELLANT

STEVEN J. HYMAN
Attorney for Appellant
370 Lexington Avenue
New York, New York 10017
Tel. (212) 725-5970

STEVEN J. HYMAN Esq.
SAMUEL B. MAYER Esq.
of Counsel
370 Lexington Avenue
New York, New York 10017
(212) 725-5970

LEGALLY YOURS O.S. ENTERPRISES, LTD.
507 Fifth Avenue, Suite 605
New York, New York 10017
(212) 697-5675

TABLE OF CONTENTS

INDEX

TABLE OF AUTHORITIES

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------X

UNITED STATES OF AMERICA,

Appellee,

- against - Dkt. No. 74-2066

CHARLES MESSINA,

Appellant.

----------X

BRIEF OF APPELLANT

CHARLES MESSINA

Preliminary Statement

On March 28, 1974, an indictment was filed in the United States District Court for the Eastern District of New York charging defendant with one count of theft of property from a foreign shipment and one count of receiving and possessing such property knowing the same to have been stolen, both in violation of 18 U.S.C. §659. The defendant was tried before Hon. Jack Weinstein and a jury, resulting in defendant's conviction on April 26, 1974, on both counts. On August 2, 1974, defendant was sentenced to imprisonment for a period of 4 years on each count, the sentences to run concurrently. On August 5, 1974, defendant filed a Notice of Appeal appealing from each and every part of the verdict, judgment and sentence.

Statement of Issues Presented for Review

1. Was the identification testimony of the witnesses Schmeltz, Bavaro and Mantione admitted into evidence in violation of defendant's right to due process of law?

2. Did the district court err in (a) finding that defendant had consented to a warrantless search of his apartment which occurred after defendant had been arraigned and had counsel appointed for him by the court, where such counsel was not informed of the search which the police agents who appeared at the arraignment had already planned; and (b) failing to exclude the evidence of the two sweaters obtained as a result of that search on the ground that they had been obtained in violation of defendant's rights to the effective assistance of counsel and to due process of law?

3. Did the district court err in failing to exclude the aforementioned identification testimony and physical evidence on the ground that said evidence had such slight probative value that the admission thereof irreparably prejudiced defendant's case in the minds of the jurors?

FACTS

On November 25, 1973, a truck containing a shipment of 44 cartons of Italian-made sweaters was found to be missing from its berth at Cargo Building 80 in Kennedy Airport. The empty truck was later recovered at a location in Brooklyn, but the shipment of sweaters was never accounted for. The defendant was convicted of the theft and possession of this shipment.

The Government's Case

At the trial, the Government's theory of the case was that the defendant perpetrated the theft by hiring Bob's Towing Service to tow the truck and its contents from the airport to the location in Brooklyn where it was eventually recovered. It was adduced at trial that a man telephoned Bob's Towing Service on November 24, 1973, requesting that the truck be towed. The following day, Robert Schmeltz, a driver for Bob's, and Robert Bavaro, the dispatcher, were watching television when a man entered the office at Bob's and announced his intention to pay for the towing job previously ordered by phone. Schmeltz then made up a bill and an authorization to tow, whereupon the man paid the towing charge and signed the authorization with the name "J. Lamonte." Bavaro later that day dispatched Kenneth Mantione

to tow the truck to a gas station in Brooklyn. At the gas station, Mantione was met by a man who helped him unhook and position the truck. A key element in the Government's case was the identification of the defendant by Schmeltz, Bavaro and Mantione as the person or persons with whom they had dealt in connection with the towing job.

The authorization to tow bearing the signature "J. Lamonte" was revealed by the Government at the trial to have been lost. However, a photocopy of this document was admitted into evidence. Despite several requests by the defense, no FBI report on a comparison of the signature on the photocopy of the authorization to tow with that of defendant was ever produced, although the Government admitted that handwriting samples had been sent to the FBI for analysis in advance of the trial. Defendant's experts, Ordway Hilton and Douglas Cromwell, testified that such a comparison made by them showed that the signature "J. Lamonte" was not written by the defendant. However, the force of this testimony was largely dissipated when Luciano Caputo, the Government's expert, testified that in his opinion no meaningful conclusion on this point could be made because of the fact that the document bearing the

questioned signature of "J. Lamonte" was only a photocopy, rather than an original.

The other significant evidence adduced by the Government, also of a circumstantial nature, consisted of a statement by the defendant that he had at his apartment two Italian-made sweaters given him by a friend for sale and the physical evidence of these two sweaters which had been taken from defendant's apartment following his statement. The defendant did not take the stand during the trial, but Detective Dominick Maiolo of the Port Authority Police and Special Agent Francis Jules of the FBI testified that the statement was made by the defendant while awaiting arraignment in the courthouse in the Eastern District of New York. The sweaters, however, were taken only after defendant's arraignment, when four police agents drove defendant home without the knowledge or consent of defendant's attorney appointed at the arraignment. One of the four officers, Detective Maiolo, entered defendant's apartment and obtained the two sweaters in question. No search warrant had been obtained by the agents with respect to the foregoing search, but it was the Government's contention at trial that defendant consented to the search and seizure of these sweaters. Although the sweaters were

admitted into evidence, no conclusive testimony was offered at the trial to show that these sweaters were in fact a part of the missing shipment.

The Identifications

The police investigation of the crime apparently centered on making an identification of the man who had appeared at Bob's Towing Service in the presence of Schmeltz and Bavaro and of the man who met Mantione at the gas station. A few days after November 25, 1973, Agent Jules and another FBI agent, in cooperation with Detective Maiolo and another Port Authority Police agent, began working with Schmeltz, Bavaro and Mantione to see if the latter could provide an identification of the perpetrator.

The officers first obtained descriptions of the perpetrator. Schmeltz described him to the officers, and again later at the hearing and trial, as having worn a red checkered coat and black fur Russian hat when Schmeltz saw him at the office at Bob's (11a,103b). Bavaro, who was with Schmeltz then at the office, described the man in question as wearing a tan raincoat with a suit underneath and a Russian fur hat (80a,94a,97a). The exact time on November 25 at which defendant appeared at Bob's in the presence of Schmeltz and Bavaro was the subject of conflicting testimony, Schmeltz averring the time to have been 5:00 P.M. (103c) and Bavaro fixing the time at 1:00 P.M. (91a). Mantione stated that the man he met at the gas station

when dropping off the truck at 9:00 P.M. on November 25 had worn a light blue work shirt with double pockets and no hat or jacket (55a,103d,103e). Each of the witnesses qualified his description, Schmeltz and Bavaro noting that they had been engrossed in watching television when the perpetrator visited the office at Bob's and consequently took only brief glances at the man (34a-35a,82a,85a), and Mantione stating it was dark out when he dropped the truck off at the gas station, although the lights in the gas station were on (58a).

All three were thereafter taken to look at books of mug shots, but none made any positive identification at such time (15a-16a,61a,83a); Mantione, in fact, made a positive misidentification (68a). Then, on November 29, 1973, Bavaro and Mantione assisted in the construction of composite drawings of the perpetrator (60a,83a). However, the best Mantione could say of the composite drawing was that "it looked quite a bit like the gentleman; it was the best you can probably do with a drawing (60a)." Schmeltz was shown the composite and had the following reaction (24a):

> Q. Did you think the picture looked like the person you had seen in Bob's Towing?

A. No, it wasn't too close to it, no.

Q. But you said it looked a little bit like it?

A. Very little.

Faced with these conflicting descriptions and equivocal or non-existent identifications from the mug shots and composite drawings, the police agents selected a group of from "a few" or "a couple" to eight snapshots, among which was a photo of the defendant, for display to the three witnesses (19a,25a,63a,83a,98a,103f). Each of the witnesses picked out the defendant from the group of pictures shown him. However, at the hearing on the admissibility of these identifications, each expressed considerable uncertainty as to the accuracy of his identification. Schmeltz testified that the picture of the defendant "looked like the guy", "was the closest to the guy in the office that I've seen" and "looks very close like the guy" (27a,37a-38a,41a).

The testimony of both Bavaro and Mantione at the hearing indicated that their identifications of the defendant from the spread of photographs were tainted by improper suggestion on the part of the agents and were just as unreliable as their conclusions from the mug shots and

composite drawings and, for that matter, their original descriptions (64a-65a,75a,84a-87a). Furthermore, at the hearing Bavaro stated he could not honestly say he could remember what the man he saw at Bob's Towing Service looked like (86a).

Based upon the foregoing photographic identifications of Schmeltz, Bavaro and Mantione, the agents next arranged for the three witnesses to view a line-up which consisted of the defendant and five FBI agents (173b). Each of the witnesses picked the defendant from the line-up. At the hearing, however, each expressed some doubt as to the source of his identification. Schmeltz, pointing out the defendant in the courtroom, testified that his line-up identification of defendant derived principally from his recollection of defendant's picture which Schmeltz had previously selected from the spread of photographs (41a-42a). Referring to his own line-up identification of defendant, Mantione testified at the hearing, "If this man was going to the gas chambers, I would say I wasn't positive" (75a). With reference to the source of his line-up identification, Mantione stated at trial that he "wasn't looking for the other men. I was looking--going to this photograph, No. 3 (indicating)" (103e). Bavaro likewise testified at the hearing that his

line-up identification of the defendant derived from his prior selection of defendant's picture (87a).

On the basis of the line-up identifications of Schmeltz, Bavaro and Mantione, the defendant was arrested on December 18, 1973, and charged with being the man who had appeared at the office of Bob's Towing Service in the presence of Schmeltz and Bavaro and who had met Mantione at the gas station when the truck was delivered.

Following the arrest of defendant, a chain of circumstances ensued leading ultimately to the seizure of the two sweaters admitted into evidence at the trial. After taking defendant into custody pursuant to an arrest warrant, Agent Jules and Detective Maiolo brought the defendant to the New York office of the FBI for processing. From there, the defendant was taken to an Assistant United States Attorney's office in the United States Courthouse in the Eastern District of New York to await arraignment. There defendant was given the required Miranda warnings. According to the testimony of Agent Jules and Detective Maiolo, the defendant stated several times that he was not feeling well and was concerned about his heart condition (114a,123a,173c,207a-208a). Furthermore, according to the same testimony, the defendant said that he was wholly

innocent of any wrongdoing, although he did have two sweaters given him by a friend for sale, which sweaters he was willing to give to the agents (115a,123a).

It was at this time, immediately prior to defendant's arraignment, that Agent Jules and Detective Maiolo apparently decided to try to obtain the two sweaters defendant had mentioned. Detective Maiolo testified as follows (113a-114a):

> Q. Did Mr. Messina indicate to you that he did not desire to talk to you?
>
> A. No, no, he spoke to me. He told me he wasn't feeling well--a problem about him getting home. I offered to take him home--myself, the two FBI agents, and my partner.
>
> Q. Was it your idea to drive him home?
>
> A. Probably was.

Having resolved to take defendant home themselves, the agents then accompanied defendant to his arraignment. At the arraignment, Edward Kelly of the Legal Aid Society was appointed by the Court to represent the defendant, and defendant pleaded not guilty to both counts of the

indictment. However, at no time either during or after the arraignment was Mr. Kelly informed of the intention of the agents to drive the defendant home and there obtain the two sweaters in question. Agent Jules first testified that at the arraignment he nodded to Mr. Kelly and said, "Don't worry about him. I'm going to drop him off at home because he wasn't feeling well (126a)." Even if this statement were acknowledged by Mr. Kelly, it revealed only half the story, since the latter never knew of the defendant's alleged statement to the agents or of the existence of the two sweaters. But Agent Jules himself negated the possibility of even this partial enlightening of defendant's counsel (129a-130a):

> Q. Did you ever identify yourself to Mr. Kelly?
>
> A. I don't think I did, no.
>
> Q. Well, was there any indication to you that Mr. Kelly in fact knew who you were?
>
> A. Well, I had been around here a long time. I was at an arraignment with a Federal prisoner so I assume someone knew I was an FBI agent.
>
> Q. But to your own knowledge, you had not

had any conversation with Mr. Kelly?

A. No.

Q. Now, when you made that statement that you say you made to Mr. Kelly, did he respond in any way?

A. I don't recall. He could have nodded, or said nothing.

Q. Well, did he? Do you know?

A. I don't know. I don't remember.

Q. But you don't remember him saying anything, certainly?

A. No, I don't.

Q. So, to your knowledge, he may not even have heard what you thought was a statement to him?

A. True.

Following the arraignment the defendant was taken to the Marshal's office for processing by the same agents, who now knew that the two sweaters they desired to obtain were in defendant's apartment, that they had gotten defendant's assent to their driving him home and that defendant's counsel was ignorant of all of these developments. Although a search warrant could have been

obtained in the very building where they then were, the agents at once proceeded to drive the defendant home. During the course of the ride, Detective Maiolo, one of four agents in the car with the defendant, apparently struck up a friendly conversation with defendant about their respective families and "what part of Italy they came from" (144a-145a). This was no doubt the reason why only Detective Maiolo accompanied defendant to his apartment. As Agent Jules testified (131a-132a):

> Q. Were you the agent in charge that day?
>
> A. Yes.
>
> Q. Why is it that you had Mr.--what is it--Maiola go upstairs instead of you going upstairs yourself? Isn't it customary that you take care of what you thought was important business, yourself?
>
> A. Because Mr. Maiola felt that he was having a rather personal conversation with Mr. Messina about Italy. We didn't want two agents to go up and I asked Det. Maiola, "Do you mind going up and

getting the sweaters?", because we didn't want his wife to get excited or anything else. A hearing was held on the admissibility of the two sweaters which Detective Maiolo thus obtained. At the conclusion of the hearing, the two sweaters were held to be admissible (150a).

Although representations were made that the Government would adduce testimony linking the two sweaters to the missing shipment (90a,106a) and the Court noted its concern with the problem of relevance (155a), the testimony on this point consisted solely of the statements of Bernard Ruderman, owner of the ultimate consignee of the shipment. Rather than pinpointing the sweaters as part of the missing shipment, Ruderman testified that the sweaters could have come from any one of two or more shipments of tens of thousands of sweaters each (170a-172a,173f). Nevertheless, the evidence was held relevant (173a), and Ruderman gave similarly inconclusive testimony at the trial (174g-174h).

The Defense Case

The defense case consisted of the testimony of its two handwriting experts, as previously discussed. In addition, Paul Schreiber, Carol Schreiber and Santo Morelli testified that the defendant was with them at a show by singer Jimmy

Roselli at the Club 802 in Brooklyn at tne time Mantione testified he met the defendant to drop off the truck containing the missing shipment of sweaters at the gas station. In testimony by Agent Jules on rebuttal, the Government sought to discredit the testimony of these witnesses by inference from defendant's silence as to his alibi defense during the time defendant was with Agent Jules on the day of the arrest and arraignment. After several minutes of such questioning, defendant's counsel objected, and the Court warned the jury not to consider this testimony (206a-207a).

At the close of the defense case, the Government was permitted to present a rebuttal case, in which Luciano Caputo, a handwriting expert, testified as previously described. The FBI analysis of the handwriting samples submitted to it was never obtained or introduced, despite defense requests for the same. Agent Jules testified in this rebuttal examination not only as to the alibi defense, but also with respect to defendant's statement made prior to the arraignment and as to the manner in which the two sweaters had been obtained from defendant (199a-209a).

On April 26, 1974, after deliberating for over a day, the jury handed up its verdict of guilty on both counts of the indictment.

ARGUMENT

POINT I

THE IDENTIFICATIONS OF DEFENDANT BY SCHMELTZ, BAVARO AND MANTIONE SHOULD NOT HAVE BEEN ADMITTED INTO EVIDENCE

One of the two key elements in the Government's case was the identification of defendant by the witnesses Schmeltz, Bavaro and Mantione as the man who had appeared at Bob's Towing Service to sign the authorization to tow and who had met Mantione when the latter delivered the towed truck at a gas station in Brooklyn. Each of these witnesses made identifications both from a spread of photographs and from a line-up.

The ultimate issue in deciding upon the admissibility of questioned identification testimony is whether under the totality of circumstances the identification procedure (1) was impermissibly suggestive and (2) gave rise to such a substantial likelihood of irreparable misidentification that to allow the witness to make an in-court identification would violate due process. Neil v. Biggers, 409 U.S.188 (1972); Simmons v. United States, 390 U.S. 377 (1968); Haberstroh v. Montanye, 493 F.2d 483 (2d Cir. 1974). This two-pronged test must be applied in the present case both to

the photographic identifications, Simmons v. United States, and the line-up identifications, Neil v. Biggers.

The Impermissible Suggestivity

The photographic identifications of defendant came only after aborted attempts to elicit identifications from Schmeltz, Bavaro and Mantione by means of mug shot albums and composite drawings. The process began on uncertain footing when the agents elicited three divergent descriptions of defendant from the three witnesses. Schmeltz said defendant had worn a red checkered coat when he appeared at Bob's (11a,103f); Bavaro, who saw defendant at the same time as Schmeltz, stated that defendant was wearing a tan raincoat and suit (80a,94a,97a); and Mantione described defendant as wearing a light blue work shirt with no jacket (55a,103g). Futhermore, Schmeltz and Bavaro qualified even these descriptions with the observation that they were engrossed in watching television while defendant was in their presence (34a-35a,82a,85a). Similarly, the mug shots viewed by the witnesses yielded no results with respect to Schmeltz and Bavaro, and only a positive mistaken identification by Mantione (68a):

> Q. Did you identify any pictures at all on that day, whether from a portfolio

or that were loose like this (indicating)?

A. I remember there was one picture I believe I said could be this person. I believe it checked out it couldn't possibly be, or something like that.

The composite drawings constructed with the help of Bavaro and Mantione drew only the grudging approval of these two witnesses and the absolute disapproval of Schmeltz (24a,60a).

By the time the photographic identification was arranged, the agents thus still had no coherent description or identification of the defendant. In fact, it should have been apparent then that Schmeltz, Bavaro and Mantione had had only an extremely limited opportunity to view the man later identified as the defendant; that the degree of attention, at least of Schmeltz and Bavaro, was negligible; and that the three witnesses' prior descriptions of the man in question were conflicting and inaccurate. Nevertheless, the agents, apparently believing they had a definite suspect in the defendant, put his picture into a spread of between two and eight other pictures for exhibition to the witnesses (19a,25a,63a,83a,98a,103h). The agents told Bavaro that one

of these pictures would be identical to the composite drawing which he had assisted in preparing (84a):

Q. When the agents came in, did they say anything to you about the pictures?

A. Just wanted me to take a look at them, pick out the best one to my knowledge that I saw.

Q. Did they tell you that they thought one of the people in the picture was the person that had come in that day?

A. They said one of the pictures would be the same, almost identical as the one I had drawn up.

Q. Did you in fact pick somebody out?

A. Yes, I did.

The testimony of Mantione indicates that he was likewise strongly influenced in his identification by the statements of the agents (64a):

Q. Did you make any statement at the time you picked the picture out?

A. Yes, it looked like the gentleman. At the time, of course, the gentleman

was wearing roguier type of clothes, and the hair was bushy.

Q. When you picked him out, did you say you were certain it was him or could have been him or might have been him?

A. They say as far as the answer like that, they say-

Q. What did you say to the agents then?

A. "I believe that's the gentleman."

Q. Did they say anything to you?

A. They said, "O.K., that's it."

It is not clear from the record whether similar circumstances attended the identification by Schmeltz, but it is apparent that after selecting defendant's picture from the photograph spread, each of the three witnesses was just as uncertain of his identification as he had been at the time he gave his description, viewed the mug shot albums and examined the composite drawings (27a,37a-38a,41a,64a,86a).

Given the overt suggestion practiced upon Bavaro and Mantione and the welter of conflicting, inconclusive and uncertain descriptions and identifications elicited from these witnesses prior to the showing of the few pictures in

the spread of photographs, the procedure surrounding the identifications made from the photographs was, in the totality of the circumstances, impermissibly suggestive. Moreover, the line-up consisting of the defendant and five FBI agents was but a confirmation of the witnesses' identifications based upon the impermissibly suggestive procedure utilized with respect to the photographic identification. This is borne out by Mantione's testimony that, rather than looking at the other men in the line-up, he specifically sought out the man he had identified from the photograph (103i). Consequently, the line-up can neither itself be purged of the suggestivity which arose upon the photographic identifications, nor can the line-up identifications make up for the uncertainty and equivocation displayed by these witnesses from the time they gave their initial descriptions to the agents right down to the ultimate line-up identification.

The Likelihood of Misidentification

Factors to be considered in evaluating the likelihood of misidentification include "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty

demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." Neil v. Biggers, supra, 409 U.S. at 199. Of course, these factors must be viewed in the light of the circumstances of the particular case, and this Court has stressed that the question of the likelihood of misidentification cannot be resolved by a general formula:

> The ultimate issue is whether under the totality of circumstances Mrs. D'Amora was identifying Gonzalez on trial as the man whose photograph she had been shown twice or whether she had such a definite image of him in her mind before the unnecessarily suggestive showing, that she was relying on it rather than the photograph. United States ex rel. Phipps v. Follette, 428 F.2d 912, 915 (2d Cir.), cert. denied, 400 U.S. 908, 91 S.Ct. 151, 27 L.Ed.2d 146 (1970). Precedent is of little value in cases such as this, each of which must be judged on its own facts. Simmons v. United States, supra, 390 U.S. at 384, 88 S.Ct. 967.

United States ex rel. Gonzales v. Zelker, 477 F.2d 797,801 (2d Cir. 1973).

Turning to the facts of the present case, it is initially apparent that certain of the factors discussed in Neil v. Biggers, supra, are relevant. The opportunity of the witnesses to view the defendant and their degree of attention at the time they did view him were both severely limited. Bavaro and Schmeltz were watching television throughout the time they claimed to have taken "glances" at defendant, and Mantione saw defendant only briefly at the gas station while jockeying the truck into position for disengagement from the tow truck (34a-35a,58a,82a,85a). The witnesses' prior descriptions of the perpetrator, the results of their viewing of mug shots, and their opinions of the composite drawings were all conflicting and inconclusive (11a,24a,55a,60a-61a,67a,80a,83a). The level of certainty of the witnesses could best be described as a significant level of uncertainty (27a,37a-38a,41a,64a,86a), perhaps best epitomized by the following testimony of Mantione (75a):

> A. As far as my recollection, this gentleman looks like the gentleman I met at the station. He's not my

father. I don't see him every day. What am I supposed to tell you?

Q. You're supposed to tell me whether you are certain with all the powers of observation that you have, whether Charles Messina-

A. Let me answer you. If this man was going to the gas chambers, I would say I wasn't positive. What am I supposed to tell you?

Moreover, none of the three witnesses could say that he had had a definite image of the defendant in his mind before the suggestive photographic identification or the line-up. At the suppression hearing, Schmeltz, after pointing to the defendant in the courtroom, testified on this issue as follows (41a-42a):

THE COURT: Are you indicating you recognize him because of what you saw that day, or because of what happened at the photographic line-up and the physical line-up?

THE WITNESS: From the picture and stuff-

THE COURT: I can't hear you.

THE WITNESS: With the picture and stuff more.

THE COURT: I can't understand what you're saying.

THE WITNESS: I recognized him with the pictures, and it looks very close like the guy.

THE COURT: As you see him now, are you saying this is the man because you remember what happened that night or because of what happened on the subsequent events when you were shown pictures and you had the line-up?

THE WITNESS: Both.

THE COURT: Can you, based on what you remember from the original event, identify this man?

THE WITNESS: Yes.

THE COURT: Putting aside what you say subsequently, are you capable of doing that?

THE WITNESS: I believe so, yes.

THE COURT: Compare what you remember that happened that day with what you now see and tell me whether it's the same person?

THE WITNESS: As best I can, it is.

Mantione was, of course, the person who had made the positive mistaken identification of defendant from the mug shot albums (68a). His testimony, including the excerpt quoted in the preceding paragraph herein, indicated no independent recollection of defendant which would carry any probative value at all (75a,103j). Finally, Bavaro testified that his identification was, in effect, of a picture (87a):

Q. Do you actually remember and I understand it's difficult, but do you actually remember what the person looked like who walked into the towing that day or did you make your identification because you remembered

what the composite had looked like, what the photograph had looked like? Can you honestly say you remember what that man looked like?

A. No, not really. I took a couple of looks at him. Then they came back and said, "The truck was hijacked" and they wanted us to draw a picture. I remember a couple of parts about him. That's about it.

Q. So when you're making your identification, when you made your identification at the line-up, were you making this identification because you remembered pictures that you had seen?

A. I would say the best of my knowledge I did what you may call it. When they drew up the pictures, in the line-up, it looked like the same man.

Q. So that--do you identify the person who was in the picture as being in court today?

A. Yes.

***

Q. Are you identifying him because you've seen him at the line-up and because you saw his photograph when they brought it to you or are you identifying him because you remember him as being the person that was in Bob's Towing?

A. I can't really say for sure. He was the man at Bob's Towing--I only turned around and saw him a couple of times.

Finally, it is most significant in terms of the prejudice introduced into this case by the admission of the identifications, that when testifying before the jury, all three of Schmeltz, Bavaro and Mantione expressed absolute and unequivocal certainty that defendant was the man they came into contact with in connection with the towing job (103a,103k,1031,103m,103n-103o). The jury thus never knew how suggestive, inconclusive and uncertain these identifications really were, as elicited in the testimony at the suppression hearing.

Viewed in the totality of the circumstances, it cannot be said that any of the witnesses Schmeltz, Bavaro and Manticne had a definite image of defendant in his mind before the suggestive photographic showing. Furthermore, in a case where identification was a key element, great importance attaches to the witnesses' limited opportunity to view defendant at the time of the original incident, their lack of attention then, their conflicting and mistaken prior identifications of defendant and the lack of certainty which they displayed at the suppression hearing. The impermissibly suggestive photographic identification procedure and the related line-up, under these circumstances, created a substantial likelihood of irreparable misidentification at trial, and the identifications thus obtained should not have been admitted into evidence.

POINT II

THE SWEATERS OBTAINED AFTER THE ARRAIGNMENT BY THE POLICE FROM DEFENDANT'S APARTMENT WITHOUT A WARRANT AND WITHOUT THE KNOWLEDGE OF DEFENDANT'S COUNSEL SHOULD NOT HAVE BEEN ADMITTED INTO EVIDENCE

The sequence of events leading up to defendant's surrender to Detective Maiolo of the two sweaters introduced by the Government at trial has been set forth in detail at pages 104a-136a, supra. To summarize these events, it will be recalled that just prior to his arraignment, defendant was in an office with Agent Jules and Detective Maiolo in the United States Courthouse for the Eastern District of New York, at which time defendant stated to the officers that he had two sweaters at his apartment (115a,123a). In view of this statement and of the fact that defendant stated he felt ill and was worried about his heart condition (114a,123a,198b,207a-208a), the officers conceived of the idea of driving defendant home after the arraignment (113a-114a).

At the arraignment itself, counsel was appointed for defendant, but neither Agent Jules nor Detective Maiolo enlightened defendant's counsel with respect to defendant's statement, the existence of the two sweaters, or the

arrangement whereby the officers would drive defendant home (129a-130a). After the arraignment, although a search warrant could have been obtained in the very building where they then were, Agent Jules and Detective Maiolo, along with two other officers, proceeded to drive defendant home. Along the way, Detective Maiolo struck up a conversation with defendant about the origins in Italy of their respective families (144a-145a). Upon arrival at defendant's home, only Detective Maiolo accompanied defendant to his apartment, where the two sweaters were then surrendered (131a-132a). At the trial, the sweaters were admitted into evidence on the theory that defendant consented to the search, and this evidence was used to draw an inference that the two sweaters were part of the missing shipment.

Defendant's Consent to the Search

It is well settled under the Fourth and Fourteenth Admendments that a search conducted without a warrant issued upon probable cause is per se unreasonable, but that such a search is valid if conducted pursuant to consent. Schneckloth v. Bustamonte, 412 U.S. 218 (1973). The prosecution must bear the burden of proving that consent

was, in fact, freely and voluntarily given. Bumper v. North Carolina, 391 U.S. 543 (1968). Thus, in the present case, the issue to be determined is whether the Government carried its burden of proving that defendant gave such free and voluntary consent as would be sufficient to validate the warrantless search for the sweaters. In making such determination, all of the surrounding circumstances must be carefully scrutinized, and a consent will be held invalid if even impliedly coerced by the most subtle means. "In examining all the surrounding circumstances to determine if in fact the consent to search was coerced, account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents."

Examination of all of the circumstances surrounding the search in the present case shows that defendant's consent was not in fact freely and voluntarily given. At the time of the alleged consent, according to the testimony of Agent Jules and Detective Maiolo, defendant had stated that he felt ill and that he was concerned about his heart condition. In this vulnerable state, defendant disclosed the existence of the two sweaters to the officers, whereupon the latter made their offer to drive defendant home. At the

arraignment, defendant's counsel was not informed of these developments, and during the ride to defendant's apartment Detective Maiolo lulled defendant into a false sense of security by subtly drawing him out with a discussion of their common Italian ancestry. That Detective Maiolo alone actually accompanied defendant to his apartment and obtained the sweaters, although Agent Jules was the officer in charge of the investigation, is confirmation of the subtle coercion which underlay defendant's alleged consent to the search.

Subversion of the Effectiveness of Counsel

Another problem equally as vexing as the issue of the voluntariness of defendant's consent inheres in the procedure by which the two sweaters were obtained from defendant. For by insulating defendant's counsel at the arraignment from even the slightest awareness that any sweaters existed, that defendant had made any statement to the police agents or that it was the design of the agents to drive defendant home to obtain the sweaters, counsel's potential effectiveness in this situation was completely destroyed. One may suspect that had counsel been informed of the foregoing developments, he might, for example, at least have asked the agents to go downstairs to obtain a search warrant before leaving the building to drive

defendant home. Or, defendant's counsel might have desired that defendant not accept the agent's offer of a ride. In any event, counsel could have found out from Agent Jules, who was present at the arraignment, what had transpired only a few minutes before the arraignment and thus counsel would have had the opportunity to effectively assist defendant with whatever advice he thought necessary in this situation.

Although there appears to be a paucity of authority on the precise point presented here, anyone viewing the procedure employed in the obtaining the sweaters must be struck by the violation of basic principles of justice and fair play evidenced here. The two sweaters should have been excluded from evidence under the Fourth, Fifth and Sixth Amendments, since the evidence was obtained in a manner calculated to circumvent the protections which counsel was appointed to provide. See Escobedo v. Illinois, 378 U.S. 478 (1964); Massiah v. United States, 377 U.S. 201 (1964); United States ex rel. Daley v. Yeager, 415 F.2d 779 (3d Cir. 1969), cert. denied, 397 U.S. 924 (1970).

POINT III

THE DEFENSE CASE WAS IRREPARABLY PREJUDICED BY THE ADMISSION INTO EVIDENCE OF THE IDENTIFICATION TESTIMONY OF SCHMELTZ, BAVARO AND MANTIONE, AND THE ADMISSION OF THE TWO SWEATERS TAKEN FROM DEFENDANT'S APARTMENT

Thus far, it has been argued that the two key items of evidence introduced by the Government in this case were so tainted that to sanction their admission into evidence would be error of constitutional dimensions. The identification testimony of Schmeltz, Bavaro and Mantione derived from impermissibly suggestive procedures giving rise to a substantial likelihood of irreparable misidentification at trial. See Point I, supra. The consent of defendant to the warrantless search for the two sweaters was wholly invalid, and the withholding of all information relative thereto from defendant's counsel was grossly unfair. See Point II, supra.

Putting aside for the moment the constitutional grounds requiring exclusion of the foregoing evidence, it is instructive to take an over-all view of the Government's case against Charles Messina. Apart from the identifications and the sweaters, there was hardly enough direct evidence, even of a circumstantial nature, to convict

defendant of the theft and criminal possession of the load of sweaters found missing from the truck towed from Kennedy Airport. The record does not reveal testimony remotely adequate to link the two seized sweaters to the missing shipment, other than the witness Ruderman's vain attempt at the suppression hearing to provide such a connection by stating his own opinion of the percentage probability that the sweaters might have been part of the shipment in question. The most that could be said was that the two sweaters might have come from one of two or more shipments of many tens of thousands of sweaters (170a-181a). The two most unreliable and least probative items of evidence, the identifications and the two sweaters, must have had enormous impact upon the minds of the jurors. Given the serious shortcomings of this evidence, as demonstrated in Points I and II, supra, its admission into evidence irreparably prejudiced defendant's case, and this prejudice in and of itself requires the reversal of defendant's conviction.*

---

*Other seriously prejudicial evidence was injected into the record when the Government examined Agent Jules as part of its rebuttal case with respect to the fact that from the time of defendant's arrest, defendant never revealed his alibi defense to Agent Jules (205a-207a).

Conclusion

The two key items of evidence introduced by the Government were the identification testimony of the witnesses Schmeltz, Bavaro and Mantione and the physical evidence of two sweaters seized at defendant's home following his release after arraignment.

The procedures underlying the identifications were impermissibly suggestive and totally unreliable, resulting in a substantial likelihood of irreparable misidentification at trial. The admission of this testimony into evidence violated defendant's Fifth Amendment right to due process of law and requires reversal of defendant's conviction.

The two sweaters introduced into evidence at trial were obtained by a warrantless search to which defendant gave no valid consent. Furthermore, this evidence was obtained in such a manner as to violate defendant's rights to the effective assistance of counsel and to due process of law. The admission of this evidence at trial thus violated defendant's rights under the Fourth, Fifth and Sixth Amendments, and requires reversal of defendant's conviction.

Both of the foregoing items of evidence should have been excluded on the ground that their probative value was so slight that, in view of all the evidence adduced by the

Government, defendant's case was irreparably prejudiced in the minds of the jury by their admission. The admission of such highly prejudicial evidence warrants the reversal of defendant's conviction.

New York, New York
October 3, 1974

Respectfully submitted,

STEVEN J. HYMAN
SAMUEL B. MAYER
of Counsel

STEVEN J. HYMAN
Attorney for Appellant
370 Lexington Avenue
New York, New York 10017
(212) 725-5970